No. 93321

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

BRUCE PIERCE,

Appellant.

Appeal from St. Louis City Circuit Court
The Honorable Thomas C. Grady, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
karen.kramer@ago.mo.gov

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF FACTS

Appellant was charged by indictment, as a prior and persistent drug offender and a prior and persistent offender, with second degree trafficking and resisting arrest (LF 11, 19-20). On November 9, 2010, appellant's cause went to trial before a jury in the Circuit Court of the City of St. Louis, but the trial ended with a hung jury (LF 8, 58). On November 30, 2011, this case went to trial before a jury in the Circuit Court of the City of St. Louis, the Honorable Thomas C. Grady presiding (LF 5).

Appellant challenges the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Officer Patrick Daut and his partner, Nate Burkemper, were a covert undercover unit working to curtail crimes such as drug trafficking, weapon violations, and gang activity (Tr. 157-158, 184). On May 5, 2010, Daut and Burkemper were on patrol in the 2900 block of James Cool Papa Bell Avenue in the Jeff Vander Lou Neighborhood (Tr. 158, 183-184). They parked their unmarked car at the curb and saw appellant walking across a vacant field towards a set of vacant buildings (Tr. 159, 184-185). Appellant started on the sidewalks and then sat down on the steps in front of a condemned vacant building at 2939 James Cool Papa Bell Avenue (Tr. 160, 185). Daut and Burkemper thought that looked suspicious because the building was

condemned and owned by the city (Tr. 160, 185). They decided to approach appellant and conduct a field interview (Tr. 161). They drove up to the curb in front of the building (Tr. 161, 185). Daut and Burkemper were in plain clothes but wore identification police vests that had the word "police" on the front and the back (Tr. 162, 184).

Officer Daut called out to appellant from their covert vehicle, saying, "Hey, it's the police. How you doing?" (Tr. 161, 185). Appellant, who appeared surprised, immediately got up and started running eastbound on the sidewalk (Tr. 163, 185-187). He then ran northbound through the gangway east of the building where he'd been sitting (Tr. 163, 186). Officer Daut pursued in their vehicle in an attempt to cut him off (Tr. 163, 187). As they neared appellant in an alley, Burkemper got out of the car and gave chase on foot (Tr. 163, 187). Daut continued parallel with them in the car (Tr. 163).

Burkemper closed to about 20-25 feet of appellant (Tr. 187). As they crossed a second vacant lot, Burkemper saw appellant throw down an object with his right hand (Tr. 164, 187). Burkemper retrieved the object, a clear plastic baggie containing an off-white substance which he believed was narcotics (Tr. 164, 188). Burkemper secured the baggie in his pocket, and then, as he sprinted after appellant, announced to appellant to stop as he was under arrest (Tr. 188).

Appellant did not stop (Tr. 189). The foot chase continued across vacant fields and through alleys until appellant ran into the rear yard at 1350 Garrison (Tr. 164, 189). Burkemper was still about 20 feet behind appellant (Tr. 189). Appellant ran up the stairs onto the sundeck where two ladies were sitting (Tr. 164, 189). Appellant shoved one of the women out of the way, opened the unlocked door, and ran into the residence (Tr. 189).

Burkemper followed appellant into the residence (Tr. 190). He saw appellant in the hallway, pulling off his polo shirt which he threw into a chair in the living room (Tr. 190). Burkemper again ordered appellant to stop (Tr. 191). Appellant complied, putting his hands behind his back (Tr. 191). Burkemper handcuffed him (Tr. 191).

In the meantime, Daut had driven around to the front side of 1350 Garrison, but when he saw that there was no means of egress from that side of the building, he parked (Tr. 165). Shortly thereafter, Detective Burkemper came out of the building with appellant in handcuffs (Tr. 165, 191). Appellant had been wearing a polo shirt, but when Detective Burkemper came out with appellant, appellant had a white t-shirt and the polo shirt was in Burkemper's hand (Tr. 165). Daut seized the shirt as evidence (Tr. 165). Burkemper also gave Daut a clear plastic baggy with suspected crack cocaine (Tr. 167, 191). Daut seized the drugs, packaged them, and took them to the lab (Tr. 168).

Daut read appellant his ***Miranda*** rights, which appellant waived (Tr. 175). Appellant said, "I am on parole. I cannot afford to take this hit. I shouldn't have gone in that lady's house, but I didn't think she would mind." (Tr. 176).

The day after the baggie was seized, lab tests were performed which revealed that the substance in the baggie was 2.51 grams of cocaine base (Tr. 215). The substance was reweighed in November, 2010 and found to weigh 2.20 grams (Tr. 217). The substance was tested again in the course of the second trial and found to be 2.14 grams of cocaine base (Tr. 225). The weight dropped due to moisture loss over time (Tr. 217, 226). Also, a small amount of the drug is used up in the course of sampling and testing (Tr. 218).

After the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of second degree trafficking and resisting arrest (LF 4-5, 102-103; Tr. 293). The trial court, having previously found that appellant was a prior and persistent drug offender (LF 4, 107; Tr. 228),[1] sentenced appellant to concurrent terms of 10 years and seven years, respectively (LF 115-117; STr. 12).

[1] The trial court took judicial notice of the previous judge's findings in appellant's first trial (Tr. 228).

The Court of Appeals, Eastern District, affirmed appellant's conviction and sentence on direct appeal. ***State v. Pierce***, No. ED98473 (Mo.App.E.D., February 26, 2013). This Court took transfer of this case per Supreme Court Rules 83.02 and 83.04.

ARGUMENT

I.

The trial court did not err, plainly or otherwise, in denying appellant's motion to dismiss.

Appellant contends that the trial court should have dismissed his case because, after his first trial ended in a hung jury, his case was not retried within the next term of court as required by Article I, Section 19 of the Missouri Constitution (App.Br. 15). Appellant's claim is without merit.

A. Standard of review.

Appellate courts review a trial court's ruling on a motion to dismiss for abuse of discretion.[2] ***State v. Ferdinand***, 371 S.W.3d 844, 850

[2] Appellant asserts that the standard of review is *de novo*. (App.Br. 16). That is the proper standard in reviewing the court's *granting* of a motion to dismiss. ***See., e.g., City of Lake Saint Louis v. City of O'Fallon***, 324 S.W.3d 756, 759 (Mo.banc 2010) ("An appellate court reviews a trial court's grant of a motion to dismiss *de novo*."). Appellant cites ***State v. Nichols***, 205 S.W.3d 215, 219 (Mo.App.S.D. 2006) for the proposition that issues of whether a case should be dismissed because of statutory or constitutional provisions are legal questions which make *de novo* review appropriate (App.Br. 15). In fact, ***Nichols*** states that review of jurisdictional issues

(Mo.App.W.D. 2012). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. ***Id.***

Appellant asserts that his is a constitutional claim, but constitutional claims must be raised at the earliest time consistent with good pleading and orderly procedure in order to be preserved. ***State v. Liberty***, 370 S.W.3d 507, 546 (Mo.banc 2012). Thus, appellant should have raised his claim by filing a motion to dismiss as soon as he believed the time ran for bringing him to trial. Instead, appellant waited until the first day of trial, and in fact agreed to or requested continuances while the case was pending, as discussed below (LF 6). If appellant's claim is deemed unpreserved, it is reviewable only for plain error. Issues that were not preserved may be reviewed for plain error only, which requires the reviewing court to find that manifest

---

present questions of law and are reviewed *de novo*. The present case does not present a jurisdictional issue, inasmuch as the trial court had personal jurisdiction over appellant and the authority to hear criminal cases. ***See, e.g., State v. Fassero***, 256 S.W.3d 109, 117 (Mo.banc 2008) (rejecting appellant's argument that he could raise claim regarding Article I, Section 19 at any time because it was "jurisdictional.")

injustice or a miscarriage of justice has resulted from the trial court error. ***State v. Baumruk***, 280 S.W.3d 600, 607 (Mo.banc 2009). Review for plain error involves a two-step process. ***Id.*** The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. ***Id.*** All prejudicial error, however, is not plain error; plain errors are those which are evident, obvious, and clear. ***Id.*** If plain error is found, the court then must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. ***Id.*** at 607-608. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. ***State v. Baxter***, 204 S.W.3d 650 (Mo.banc 2006).

The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review. ***State v. Mayes***, 63 S.W.3d 615, 633 (Mo.banc 2001). Unless a claim of plain error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted, an appellate court will decline to exercise its discretion to review for plain error under Rule 30.20. ***State v. Chaney***, 967 S.W.2d 47, 59 (Mo.banc 1998).

B. Relevant facts.

Appellant's first trial ended in a mistrial on November 10, 2010 due to a hung jury (LF 8). A trial setting was scheduled for January 10, 2011 (LF 8). On January 14, the case was continued until March 7, 2011 due to attorney conflict (LF 7). On March 7, the case was continued until March 10, 2011, due to attorney conflict (LF 7). On March 10, 2011, a trial setting was scheduled for April 4, 2011 (LF 7). On April 6, 2011, the case was continued because the cause was not reached, and a trial setting was scheduled for May 23, 2011 (LF 7). On May 24, 2011, the case was continued until May 24, 2011 (LF 7).

On May 24, 2011, the case was continued at the request of the prosecution due to an unavailable witness (LF 6). Appellant's case was set for trial on July 26, 2011 (LF 6).

On July 27, 2011, the cause was continued due to defense counsel's illness (LF 6). On August 24, 2011, appellant's case was continued at appellant's request due to an attorney conflict (LF 6). On October 27, 2011, the case was again continued due to attorney conflict (LF 6). On November 30, 2011, appellant's case was presented for trial (LF 5).

Appellant filed a motion to dismiss on the grounds of a violation of a constitutional time limit (Tr. 5).[3] Appellant argued that four terms of court had passed since his first trial (Tr. 6). Appellant asserted that Article I, Section 19 of the Missouri Constitution provides that a defendant's retrial should be done within the same term of court or the following term and that had not occurred (Tr. 6). The prosecution observed that this was the third time that appellant's case had been called for trial since the mistrial (Tr. 6). Defense counsel said that it had been set for trial in May, but the state requested a continuance because the lab technician was not available (Tr. 7). The prosecutor observed that appellant had asked for another reweigh of the drugs, but the state did not want the drugs weighed by yet another chemist, but rather by the original chemist (Tr. 7). The prosecutor observed that the case was set again later but defense counsel was sick (Tr. 7). Defense counsel also observed that he "was in trial a lot." (Tr. 7). The trial court denied the motion to dismiss (Tr. 8).

C. Analysis.

The trial court did not err in declining to dismiss appellant's case. The record does not reflect any step by appellant, at the time of mistrial or thereafter, to challenge the timing of the trial setting for his retrial until the actual date the case went to trial.

[3] That motion does not appear in the legal file.

> Article I, Section 19 of the Missouri Constitution reads as follows:
>
> That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

Respondent is not aware of any caselaw in Missouri interpreting the constitutional provision at issue in appellant's claim. Respondent notes that the constitutional provision does not state what results should follow if the defendant is not brought to trial within the same or next term of court. Generally, if statutes or provisions merely require certain things to be done and do not prescribe the results that follow if they are not done, such statute or provision is merely directory. ***Rundquest v. Director of Revenue, State of Mo.***, 62 S.W.3d 643, 646 (Mo.App.E.D. 2001). The language in Article I, Section 19 merely directs the court to commit the defendant for trial in the same or next term. It does not prohibit trial in any subsequent term or state

any consequence for failing to set trial in the next term. In short, there is nothing that would mandate dismissal under the circumstances in this case. And as this Court noted in ***State v. Fassero***, 256 S.W.3d 109, 117 n.3 (Mo.banc 2008),[4] "[t]he continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any criminal proceedings pending before it, which it is otherwise by law authorized to do or take." See also Supreme Court Rule 20.01(c): "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court."

---

[4] Appellant argues that ***Fassero*** is inapposite, in part, because the claim was not preserved therein and he maintains that he did preserve his claim because he filed his motion and raised his objection the morning of trial (App.Br. 19-20). But any constitutional claim must be raised at the earliest time consistent with good pleading and orderly procedure in order to be preserved. ***State v. Liberty***, 370 S.W.3d 507, 546 (Mo.banc 2012). Thus, appellant should have raised his claim by filing a motion to dismiss as soon as the time ran. Instead, appellant waited until the first day of trial, and in fact agreed to or requested continuances (LF 6). Appellant did not preserve his claim.

Moreover, caselaw interpreting analogous statutory language demonstrates that appellant did not suffer prejudice and in fact waived any claim regarding the timing of his retrial.

Section 545.890, RSMo 2000, provides that a defendant who is not brought to trial before the end of the second term of the court shall be entitled to discharge, unless the delay shall happen on the application of the prisoner or shall be occasioned by the want of time to try the cause at such second term.[5] Section 545.920, RSMo 2000, states that in all cities or counties in which there shall be more than two regular terms of the court having jurisdiction of criminal cases, the defendant shall not be entitled to discharge until the end of the third term after the indictment was found, or until the end of the fourth term, if he is on bail.[6]

---

[5] While this statute is strikingly similar to the constitutional language, it is also strikingly dissimilar in that the statute states that the defendant "shall be entitled to discharge" while the constitutional language contains no such provision.

[6] Absent a local rule stating otherwise, all of Missouri's circuit courts "shall be considered as being in continual session . . . ." §478.205, RSMo 2000. But, "[t]o the extent that a term of a circuit court may be required or specified by any provision of law, terms of each circuit court of the state shall be

In ***State v. Harper***, 473 S.W.2d 419 (Mo.banc 1971), the defendant argued, similarly to appellant in the present case, that he was entitled to discharge because he was not brought to trial by the end of the relevant term of court. The Supreme Court flatly rejected Harper's claim because he had failed to take any affirmative action seeking a speedy trial and thus had waived the right. ***Id.*** at 424. The Court noted that the statutory enactments were enacted for the benefit of an accused, implementing his constitutional right to a speedy trial. ***Id.*** at 424. The statutes were to "prevent unreasonable delays in prosecutions, forestalling the protracted imprisonment or harassment of one accused of crime." ***Id.*** The statutory provisions were not intended to "furnish a technical escape from trial and punishment or to forfeit any rights of the public." ***Id.*** The Missouri Supreme Court found that the legislature "never intended . . . to place . . . an arbitrary duty on the state that a defendant who does not desire a prompt trial can sit idly by without objecting to the delay or requesting a trial and, at the appropriate time, successfully assert a motion for release claiming that his right to a speedy trial had been violated and that he should go 'scot free.'" ***Id.***

---

considered as commencing on the second Mondays in February, May, August, and November of each year . . . ." §478.205, RSMo 2000. The Circuit Court of the City of St. Louis does not have a local Rule designating terms of court.

at 424. Thus, the Missouri Supreme Court found that a defendant was not entitled to release under the statutes simply because the required number of terms had elapsed. ***Id.*** The defendant had to show that he had demanded a trial, and that such request was made without success for a reasonable length of time before his right to release has been asserted. ***Id.***

In addition, "[a] defendant is not entitled to be released under these sections unless he demanded a trial, and was not granted it within a reasonable length of time." ***State v. Powers***, 613 S.W.3d 955, 959 (Mo.App.S.D. 1981). "[I]f defendant seeks, consents to or connives at delay of the case . . . , defendant ordinarily may not successfully invoke the bar of the statute." ***State v. Werbin***, 345 S.W.2d 103, 105-106 (Mo. 1961).

A similar interpretation should be given to the language in Article I, §19. That language, like the statutory language at issue in ***Harper,*** was meant to prevent an unreasonable delay in the prosecution, not to "furnish a technical escape from trial and punishment." Appellant is not entitled to release simply because the required number of terms had elapsed. Appellant has not shown that he demanded a trial at all, let alone that his request was made and denied a reasonable length of time before he asserted his claim to discharge. Where, as here, there is no indication that appellant objected to the initial retrial settings and made no attempt or argument to have the retrial take place sooner, it cannot be said that the trial court abused its

discretion in failing to bring the case to trial sooner than it did. And appellant has not even begun to show that he was prejudiced by the fact that his case did not go to retrial sooner than it did.

Appellant's claim would also fail if one were to apply the traditional balancing test set forth in ***Barker v. Wingo,*** 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to determine whether a defendant has been denied his constitutional right to a speedy trial. The test requires balancing four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. ***State v. Ivester***, 978 S.W.2d 762, 764 (Mo.App.E.D. 1998). Here, appellant's case was retried a year after the mistrial was declared in his first case. Much of the delay was attributable to attorney conflict. The record does not demonstrate that appellant ever asserted his right to have the case set during the "next term of court," or ever raised the issue of the timing of his new trial until the first day of trial, prior to selection of the jury (LF 5). The record reflects no objection on appellant's part to any of the previous trial settings or to any continuance, nor does the record reflect any assertion of appellant's speedy trial rights. And appellant has not alleged any prejudice. He would not be entitled to dismissal under ***Barker v. Wingo***.

Appellant argues, however, that his issue is not a speedy trial claim, but that his right to trial "flows from" his right to be free double jeopardy

(App.Br. 18). But appellant's claim is not one of double jeopardy. The right against double jeopardy (per the Missouri Constitution) is the right not to be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury. Missouri Constitution, Article I, Section 19. *When* someone is brought to trial has nothing to do with one's "double jeopardy" rights although it may have something to do with his or her rights to a speedy trial. It makes no logical or legal sense to suggest, for example, that if appellant had been retried on May 6, 2011, his double jeopardy rights would not have been violated, but if he went to trial on May 9, 2011 he would have been subjected to "double jeopardy".[7]

Appellant, of course, is relying on the fact that the provision at the root of his claim is in the Missouri constitutional section on double jeopardy. But all that particular provision regarding the time of retrial does is clarify that failure of a jury to reach a verdict does not equate to an "acquittal" for double jeopardy purposes, and attempt to assure that any retrial is conducted in a

---

[7] Because the Circuit Court of the City of St. Louis has no local rule governing terms of court, the terms of court are deemed to begin on the second Mondays in February, May, August, and November. §478.205; 22nd Circuit Court Local Rule 2.2. Thus, for example, in 2011, a term of court would have begun on May 9 – the second Monday in May.

timely manner. Failure to do so does not mean that a defendant has unconstitutionally been put in jeopardy of life or liberty for the same offense after having been acquitted. Appellant points to no authority that failure to be brought to retrial within a specified time is "double jeopardy," and respondent is not aware of any.

Appellant's claim is that he was not retried in time – this *is* essentially a speedy trial claim, notwithstanding appellant's assertion that he is not seeking a speedy trial. Whether the constitutional right to a speedy trial has been violated is subject to the balancing test set forth in ***Barker v. Wingo*** There is no logical reason why any constitutional right to be retried within a certain timeframe should not be subject to the same analysis. Moreover, the language in Article I, §19 serves the same purpose as the statutory language in §545.890, RSMo 2000, to implement a defendant's constitutional right to a speedy trial and to "prevent unreasonable delays in prosecutions, forestalling the protracted imprisonment or harassment of one accused of crime." ***State v. Harper***, 473 S.W.2d 419, 424 (Mo.banc 1971).

Appellant asserts that he has a constitutional right to be tried by the end of the second term of court because the language appears in the Missouri Constitution (App.Br. 20). But the constitutional right to speedy trial is still subject to limitations, as demonstrated by ***Barker v. Wingo***. The fact that the Missouri Constitution provides a time frame for retrial after a jury is

unable to reach a verdict does not mean that that provision is not or cannot be subject to the same analysis as any other constitutional speedy trial provision. Indeed, to treat it otherwise would create an illogical and unnecessary distinction between a retrial due to a prior hung jury (which is the only provision covered in Article I, §19[8]) and a retrial due to a reversal after direct appeal.

Finally, appellant asserts "public policy concerns" to support interpreting the provision to bar lengthy delays (App.Br. 22-23). Respondent agrees that the provision is intended to bar lengthy delays, and that delays should be avoided *where possible*; but there can be legitimate reasons for delays on a retrial just as there may be legitimate delays for an initial trial. Indeed, appellant himself created or sought out delays for the retrial in the present case, i.e., he sought to have the drugs reweighed, he needed a continuance because his counsel was sick or in trial, etc. (Tr. 7; LF 6).[9] It is

---

[8] The timing provision specifically applies to cases wherein the jury fails to render a verdict.

[9] Indeed, given that appellant himself sought to have the drugs reweighed after the first trial, appellant's assertion that the parties are "by definition ready for trial" is not well-taken (App.Br. 22). There are cases where that may be true; but there are cases where that may not be true, inasmuch as

because there may be valid reasons for delay that the law requires a balancing of factors to determine whether a defendant has, in fact, been denied his right to a trial within a certain timeframe. To require an absolute, drop-dead time limitation for a retrial after a mistrial, as appellant would have, would wreak havoc with overcrowded trial court dockets and overtaxed public defenders and prosecutors. The better practice would be to interpret the provision in Article I, §19 like all of the other speedy trial provisions in Missouri law.

In short, the fact that appellant was not retried by the end of the second term of court does not entitle appellant to discharge. He is not entitled to a technical escape from trial and punishment. Appellant has failed to show that the delay in his retrial violated any constitutional right he might have to a speedy trial. Appellant's claim is without merit and should be denied.

---

witnesses become unavailable, parties seek to develop evidence to address the issues that may have led to a mistrial, etc.

II.

The trial court did not err in failing to submit appellant's "Instruction A" on the lesser included offense of possession of a controlled substance.

Appellant contends that the trial court erred in refusing to submit his proffered instruction on the lesser-included offense of possession of a controlled substance (App.Br. 21). Appellant argues the jury could have rejected the purportedly inconsistent testimony as to the weight of the cocaine base (App.Br. 21). Appellant's claim is without merit because there was no evidence to acquit of the greater offense of trafficking in the second degree.

A. Standard of review.

In reviewing whether a trial court erred in failing to instruct the jury on a lesser-included offense, we review the evidence in a light most favorable to the defendant. ***State v. Taylor***, 373 S.W.3d 513, 524 (Mo.App.E.D. 2012).

B. Relevant facts.

Appellant was charged with second degree trafficking under §195.223.3, which provides, in pertinent part, as follows: A person commits the crime of trafficking drugs in the second degree if, except as authorized by §§ 195.005 to 195.425, he possesses or has under his control, purchases or attempts to purchase, or brings into this state more than two grams of a

mixture or substance described in subsection 2 of this section which contains cocaine base. §195.223.3, RSMo Cum.Supp. 2011.

The evidence showed that appellant discarded a baggie containing cocaine base (Tr. 164, 187-188). The day after the baggie was seized, lab tests were performed which revealed that the substance in the baggie was 2.51 grams of cocaine base (Tr. 215). The substance was reweighed in November 2010 and found to weigh 2.20 grams (Tr. 217). The substance was tested again in the course of the second trial and found to be 2.14 grams of cocaine base (Tr. 225). The weight dropped due to moisture loss over time (Tr. 217, 226). Also, a small amount of the drug is used up in the course of sampling and testing (Tr. 218).

At the instructions conference, appellant requested an instruction on the lesser included offense of possession of a controlled substance (Tr. 271). Defense counsel argued that in light of the testimony concerning moisture loss, there was a basis for finding him guilty of mere possession since he may have possessed less than two grams of crack cocaine (Tr. 271). The trial court refused the instruction (Tr. 271).

C. Analysis.

The trial court did not err in refusing to submit appellant's instruction on the lesser-included offense of possession of a controlled substance. There was no evidence to acquit of the greater offense.

An instruction on a lesser included offense is not required unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. §556.046.2, RSMo. To acquit of the greater offense, there must be some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater offense and the conviction of the lesser. ***State v. Taylor***, 373 S.W.3d 513, 524 (Mo.App.E.D. 2012). A lesser-included offense instruction is not required where there is strong and substantial proof of the offense charged, and the evidence does not suggest a questionable essential element of the more serious offense charged. ***Id.*** The question is whether a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established. ***Id.***

In the present case, there was no evidence that an essential element of the greater offense had not been established. In order to convict appellant of second degree trafficking, the state had to prove that he possessed more than 2 grams of a substance containing cocaine base. At the time of the crime, the substance containing cocaine base weighed 2.5 grams. The drug was weighed two more times over the course of a year and a half and, despite the fact that the substance had lost moisture, it still weighed over 2 grams at the time of trial. There was simply no basis in the evidence to find that the substance containing cocaine base weighed less than 2 grams.

Appellant suggests that this case is governed by ***State v. Williams***, 313 S.W.3d 656 (Mo.banc 2010) (App.Br. 27). Appellant asserts that a defendant may receive an instruction on lesser included offense based solely on the fact that the jury might disbelieve some of the State's evidence (App.Br. 26). But ***Williams*** should not be read so broadly. ***Williams*** does not stand for the proposition that *any* evidence, no matter how limited or lacking in probative value, will support submission of an instruction on a lesser included offense. ***State v. Lowe***, 318 S.W.3d 812, 821 (Mo.App.W.D. 2010). The Supreme Court still applies the reasonable juror standard, which requires a lesser included offense only "[i]f a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established." ***Williams***, 313 S.W.3d at 660; ***Lowe, supra.; State v. Greer***, 348 S.W.3d 149, 154 (Mo.App.E.D. 2011). Under the evidence in the present case, no reasonable juror could conclude that when appellant possessed 2.5 grams of cocaine base in May, 2010, he might have actually only possessed something less than 2 grams. While appellant argues that the measurement was different every time (App.Br. 29), the measurement was *always* more than the statutory threshold for trafficking and there was an explanation as to why the measurements would decrease over time. Moreover, the only real measurement that mattered was that the day after his arrest, the date closest to his possession of the drug.

There was simply no reasonable basis in the evidence to conclude that appellant did not possess more than two grams of cocaine base. Appellant was not entitled to a lesser included offense instruction.

III.

The trial court did not err in overruling appellant's motion for judgment of acquittal as there was sufficient evidence to support his conviction for resisting arrest.

Appellant contends that there was insufficient evidence to support his conviction for resisting arrest because the State failed to prove that he fled with the purpose of preventing the law enforcement officers from making an arrest (App.Br. 18). Appellant's claim is without merit as there was sufficient evidence to support his conviction.

A. Standard of review.

This Court's review of the sufficiency of the evidence is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt. ***State v. Nash***, 339 S.W.3d 500, 508-09 (Mo. banc 2011). This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. ***Id.*** at 509. In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence. ***Id.*** All evidence and inferences to the contrary are

disregarded. ***Id.*** When reviewing the sufficiency of the evidence supporting a criminal conviction, this Court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. ***Id.*** This Court will not weigh the evidence anew since the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances, and other testimony in the case. ***Id.***

B. Analysis.

Appellant was charged with resisting arrest on the grounds that Officer Burkemper was making an arrest of appellant for second degree trafficking, appellant knew or reasonably should have known that the officer was making an arrest, and, for the purpose of preventing Officer Burkemper from affecting the arrest, appellant resisted the arrest by fleeing (LF 12). Appellant contends that the state failed to prove that appellant fled with the purpose of preventing the officer from completing the arrest (App.Br. 18).

Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

Officer Patrick Daut and his partner, Nate Burkemper, were on patrol in the 2900 block of James Cool Papa Bell Avenue in the Jeff Vander Lou Neighborhood when they saw appellant walking across a vacant field towards a set of vacant buildings (Tr. 158-159, 183-185). Appellant sat down on the steps in front of a condemned vacant building at 2939 James Cool Papa Bell

Avenue (Tr. 160, 185). Daut and Burkemper thought that looked suspicious because the building was condemned and owned by the city (Tr. 160, 185). They decided to approach appellant and conduct a field interview (Tr. 161).

They drove up to the curb in front of the building (Tr. 161, 185). Daut and Burkemper were in plain clothes but wore identification police vests that had the word "police" on the front and the back (Tr. 162, 184).

Officer Daut called out to appellant from their covert vehicle, saying, "Hey, it's the police. How you doing?" (Tr. 161, 185). Appellant, who appeared surprised, immediately got up and started running eastbound on the sidewalk (Tr. 163, 185-187). He then ran northbound through the gangway east of the building where he'd been sitting (Tr. 163, 186). Officer Daut pursued in their vehicle in an attempt to cut him off (Tr. 163, 187). As they neared appellant in an alley, Burkemper got out of the car and gave chase on foot (Tr. 163, 187).

Burkemper closed to about 20-25 feet of appellant (Tr. 187). As they crossed a second vacant lot, Burkemper saw appellant throw down an object with his right hand (Tr. 164, 187). Burkemper retrieved the object, a clear plastic baggie containing an off-white substance which he believed was narcotics (Tr. 164, 188). Burkemper secured the baggie in his pocket, and then, as he sprinted after appellant, announced to appellant to stop as he was under arrest (Tr. 188).

Appellant did not stop (Tr. 189). The foot chase continued across vacant fields and through alleys until appellant ran into the rear yard at 1350 Garrison (Tr. 164, 189). Burkemper was still about 20 feet behind appellant (Tr. 189). Appellant ran up the stairs onto the sundeck where two ladies were sitting (Tr. 164, 189). Appellant shoved one of the women out of the way, opened the unlocked door, and ran into the residence (Tr. 189).

Burkemper followed appellant into the residence (Tr. 190). He saw appellant in the hallway, pulling off his polo shirt which he threw into a chair in the living room (Tr. 190). Burkemper again ordered appellant to stop (Tr. 191). This time, appellant complied, putting his hands behind his back (Tr. 191). Burkemper handcuffed him (Tr. 191).

Daut read appellant his ***Miranda*** rights, which appellant waived (Tr. 175). Appellant said, "I am on parole. I cannot afford to take this hit. I shouldn't have gone in that lady's house, but I didn't think she would mind." (Tr. 176).

The evidence shows that Officer Burkemper told appellant to stop because he was under arrest, but appellant did not stop and instead continued to run away. Appellant clearly resisted arrest by fleeing from Officer Burkemper after the officer told him to stop because he was under arrest.

Appellant contends that the evidence was insufficient because he started running before there was any reason to arrest him, and when Officer Burkemper told him to stop, he merely continued doing what he had already been doing, running. A similar argument was made in ***State v. St. George***, 215 S.W.3d 341 (Mo.App.S.D. 2007). Therein, the officer observed the defendant speeding and thus tried to perform a traffic stop. ***Id.*** at 343. The defendant pulled over, but when the officer approached the vehicle, the defendant sped away. ***Id.*** The officer pursued the defendant, who eventually pulled over again. ***Id.*** The officer told defendant that he was going to give him a couple of tickets. ***Id.*** Appellant sped off again, followed by the officer. ***Id.*** The defendant eventually stopped for a third time, and the officer told him he was going to be taken into custody. ***Id.*** at 343-344. The defendant sped off again, the officer in pursuit. ***Id.*** at 344. After a car chase and a foot chase, the defendant was apprehended and arrested. ***Id.***

On appeal, the defendant argued there was insufficient evidence that at the time he fled from the officer, the officer was arresting him for a felony. ***Id.*** at 344-345. The defendant argued that while he was eventually charged with a felony, there was no evidence that the officer was making an arrest when the defendant initially fled. ***Id.*** at 346. The Court of Appeals found that the defendant's "focus on his initial flight to extirpate him from the charge of resisting arrest for a felony is of no avail to him." ***Id.*** " 'During a

suspect's flight from a law enforcement officer, the actions of the suspect may constitute a separate crime, giving rise to a reason to arrest the suspect.'" The Court found that the defendant "continued resisting arrest" as he fled when he was driving away after the third stop when the circumstances clearly indicated that the officer was attempting an arrest. ***Id.*** at 347. He also continued resisting arrest when he fled on foot and ignored the officer's command to stop. ***Id.***

Similarly in the present case, even though when appellant initially started running, the officers were not contemplating an arrest, the evidence showed that he revealed commission of a crime in the course of his running, was told to stop as he was under arrest, but continued to run, thereby resisting arrest.

Appellant's case is also like ***State v. Hopson***, 168 S.W.3d 557 (Mo.App.E.D. 2005). In ***Hopson***, an officer noticed the defendant driving a car with license plates that looked like the tags had been taken from another license plate. ***Id.*** at 560. The officer pulled behind the vehicle and ran a license plate check. ***Id.*** Determining that no license plate had been issued to the defendant's car, the officer activated his emergency lights to pull the defendant over. ***Id.*** The defendant slowed down, threw three baggies of cocaine base out of the car, and then sped off. ***Id.*** After a car chase, the defendant abandoned his car and was chased on foot. ***Id.*** The Court of

Appeals found that appellant began to flee after he threw out the cocaine base. ***Id.*** at 561.

Similarly in the present case, even though appellant was running prior to his discarding the cocaine base, once he threw the drugs, he was told to stop because he was under arrest, but instead of complying with the officer's order and stopping, appellant ran in an attempt to avoid arrest. It was not necessary, as appellant suggests, for him to stop running, and then start running again in order for him to be guilty of resisting arrest by fleeing. When appellant was ordered to stop because he was under arrest, he had an obligation to do so, but instead he continued running, knowing that Officer Burkemper wanted him to stop in order to arrest him. He was only 20 feet from Officer Burkemper when the officer shouted, ordering him to stop because he was under arrest (Tr. 188). Instead, appellant continued to run, fleeing into a stranger's house where he took off his shirt in an attempt to change his appearance (Tr. 189-190). He told the officers, when he was arrested, that he was on parole and could "not afford to take this hit." (Tr. 176). This was sufficient evidence of resisting arrest. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Karen L. Kramer
KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,620 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 25 day of July, 2012, to:

Roxanna A. Mason
Office of Public Defender
1010 Market Street, Suite 1100
St. Louis, MO 63101

/s/ Karen L. Kramer
KAREN L. KRAMER